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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re E.R., a Person Coming Under the Juvenile Court Law.	
SAN FRANCISCO DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. M.G., Defendant and Appellant.	A111784 (San Francisco County Super. Ct. No. JD 05-3127)

M.G., the mother of E.R. (and hereinafter referred to as Mother), appeals from the dispositional order by which the juvenile court declared E.R. a dependent child. Mother advances two substantial evidence arguments. First, she contends the court's jurisdictional finding lacks the requisite evidentiary support. Second, she contends that the part of the jurisdictional order not returning E.R. to her custody is subject to the same defect. We conclude that both contentions are without merit, and we affirm.

BACKGROUND

On April 25, 2005, respondent San Francisco Department of Human Services (Department) filed a petition in which it was alleged that E.R. was at risk of suffering

serious physical harm within the meaning of Welfare and Institutions Code[1] section 300, subdivision (b). Specifically, the Department alleged that Mother had "hit the child with her hands, hit him on his forehead with a hairbrush and struck him with an extension cord."[2] In its detention report filed with the petition the Department asked that the juvenile court order E.R. detained. The court made that order the next day.

The jurisdictional hearing was initially set for May 10, 2005, but the hearing date was continued to August 15, 2005. A week before the August hearing, Mother filed written hearsay objections to portions of the Department's detention report, and to the Department's disposition report filed on May 27, 2005.

Meanwhile, the Department also provided the court with two addenda to its disposition report, in which the Department's original recommendation was that E.R. be made a dependent child, with his custody placed in the care of the Department while he was in foster care. In the first addendum, filed June 23, 2005, the Department changed its recommendation to permit placing E.R. in his father's custody. The Department advised the court that it "is not recommending [t]hat the Court dismiss the petition of [E.R.] . . . because [the father] has not provided continuous care of his son over the past years although he has cared for him, on and off, on occasion. While the father has not reported any incidents when the minor was visiting with him, there are concerns that the [Department] still has in regards to the father's ability to successfully care for the minor without any Court supervision."

By the time of the second addendum, filed August 11, 2005, the Department had allowed E.R. to live with his father, and the results were apparently deemed successful. The Department amended its recommendations and now recommended the court to: (1) declare E.R. a dependent child; (2) place his custody with his father; (3) dismiss the petition as to E.R.; and (4) terminate the court's jurisdiction. The last two

[1] Further statutory references are to the Welfare and Institutions Code unless otherwise specified.

[2] The petition was also directed against E.R.'s father, and was also sustained as to him. The father is not a party to this appeal. A second of Mother's children was involved in the proceedings, but also plays no part on this appeal.

recommendations were apparently the result of E.R.'s living with his father, the Department case worker accepting the father's assurances that "he quickly learned how to handle the minor, especially with the help of . . . family therapy. The father told the undersigned that he is confident that he is able to care [for] and supervise the minor without Court intervention because he would do whatever it takes to help the minor." The case worker further reported that things were improving in E.R.'s relationship with Mother, who was not averse to a change of E.R.'s placement: "While the minor is no longer reporting that he is fearful of the mother and wants to visit with the mother, he continued to state that he wants to live with the father. The mother reported to the undersigned on 08/11/2005 that . . . she has no problem with the minor living with the father."

By the time the August 15 hearing commenced, it was to serve the dual functions of the jurisdictional hearing and the dispositional hearing. At the start of the hearing, the court ruled on Mother's objections, overruling some but sustaining more. The court then heard testimony from Department social worker Van Luong, who had prepared the disposition report, and the two addenda to it.

Luong explained why the Department was recommending that E.R.'s father—who had had temporary custody since July 25, 2005—have sole legal and physical custody: "The child is not living with the mother, so it would not be appropriate to recommend physical custody with the mother since the dad is having the child. [¶] And the legal custody because, since the child is living with the dad and he knows the ins and outs about the child . . . he would be the best to make those decisions in regard to educational and medical and mental services for the child." Moreover, "[E.R.] has indicated to me that he want[s] to stay with the dad. So that is the second reason. And in conversation with the mother too, and she is all right with the decision." Although there were some problems when E.R. first began living with his father, they subsequently "stabilized."

Luong also testified that E.R. and his father are getting family therapy, and that Mother is not willing to attend therapy unless ordered by the court. Luong believed that E.R. and Mother had a "conflicted relationship" that only mutual therapy could correct.

On cross-examination by Mother's attorney, Luong testified that, up to June 23, 2005, E.R. did not want to live with Mother; after that date, "he's been vacillating back and forth." The initial attempts at visitation were rocky: E.R. "only wanted to visit with the mother one day rather than two days," to which Mother responded that "since her son doesn't want to see her, then she doesn't want to see him . . . . But later she indicated that the reason she can't see him is because she is busy." In subsequent weeks, however, visitation resumed, and Mother has had unsupervised overnight visits with E.R., which appear to be occurring without incident.

When examined by the father's attorney, Luong explain his earlier testimony about E.R. "vacillating" about living with his father: E.R. "waivered [*sic*] from time to time," but "[o]nly in regards to with [sic] his dad's home, return to his dad's home or in foster home. [E.R.] never told me that he wanted to go live with his mother or he wanted to return to his mother." E.R. has been "pretty consistent in wanting to live with his father." Luong testified that "I have observed them together before, and it seems like the father is very appropriate and he is able to set boundaries and limits with the child. I know that he is frustrated sometimes because the child want[s] to manipulate some situations, but I think overall he is handling it quite appropriately."

Luong spoke with E.R. about the incident of April 21, 2005, the basis for the Department's petition: "He [E.R.] indicated that his mom had hit him with the brush on his head and there was some swelling and so forth. [¶] . . . [¶] He told me that his mom gets angry very easily. His mom when she get[s] angry she would hit him, she would slap him with her hand sometimes, whatever object was near her she hit him with that."

The court received the Department's reports and addenda in evidence, overruling Mother's objection to certain attachments to the detention report.

Mother began her testimony by describing what happened on April 21: She had asked E.R. if he had taken a cell phone from his grandmother. E.R. said he didn't, but Mother then found the phone hidden in E.R.'s room. "What had happened, while I was looking for it, the phone, [E.R.] was like behind me. He hovered behind me like close to me . . . I don't know, I was scared. And I had the brush from doing my daughter's hair,

and then the next thing you know, he was so close to me acting angry, I just struck him with the brush." She struck him just once, hitting him on his head, because she "feared for [her] safety." She did not notice any visible injury on him. She did not strike him with her hand, or with an extension cord. She then sent E.R. to his room. E.R., who had lately been having "growing pains," then left the home. Mother checked with E.R.'s school, his father, and eventually called police. Later that day, a police officer and a Department case worker told her that E.R. had been found.

Before Mother had finished her direct examination, the court continued the matter to August 30, 2005. Mother resumed her testimony at the beginning of the August 30 hearing, and testified that the single blow she gave E.R. with the hairbrush was not intentional. Mother testified that she regrets her action, does not think it will be repeated, and that E.R. told her that he wants to live with her. Mother's opinion was that any visible injuries E.R. had were the result of his leaving his room in their third-story apartment by jumping out the window.

San Francisco Police Officer John Nevin testified as a rebuttal witness for the Department. He testified that on April 21, 2005, he was directed to a fire station, where he found a crying and distraught E.R. E.R. told Nevin that Mother had not only hit him with the hairbrush, but had also slapped him and hit him "a few times over the chest" with an extension cord. E.R. had a welt on his forehead, and a photograph of the welt was received in evidence. Nevin testified that it was decided not to allow E.R. to go back home "for his own safety," and he was taken to child protective services.[3]

On September 19, 2005, the court filed its "Order After Hearing Contested Jurisdiction/Disposition." The court sustained the petition's allegations (as amended by the court), declared E.R. to be a dependent child, and placed his custody with his father. It also, as recommended by the Department, dismissed the petition and terminated its

[3] Additional testimony was provided by E.R.'s father, and by appellant, but was stricken as not proper rebuttal.

jurisdiction. After the court denied Mother's application for rehearing, she filed a timely notice of appeal.[4]

DISCUSSION

"The issue of sufficiency of the evidence in dependency cases is governed by the same rules that apply to other appeals. If there is substantial evidence to support the findings of the juvenile court, we uphold those findings. [Citation.] We do not evaluate the credibility of witnesses, reweigh the evidence, or resolve evidentiary conflicts. Rather, we draw all reasonable inferences in support of the findings, consider the record most favorably to the juvenile court's order, and affirm the order if supported by substantial evidence even if other evidence supports a contrary conclusion. [Citation.] The appellant has the burden of showing the finding or order is not supported by substantial evidence. [Citation.]" (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.)

The Evidentiary Framework

Before this standard can be applied, it is appropriate to delineate those portions of the record that may not be considered. This requires some detail as to the juvenile court's rulings in response to Mother's written objections, and to how those rulings figure in the procedures for conducting a jurisdictional hearing.

Four paragraphs in the Department's detention report describe the report received by the "CES Hotline" from the fire station where E.R. sought help. Most of the paragraphs appear to recount statements made by E.R. to a Department case worker. The court granted Mother's hearsay objection in part, ruling that "the Court cannot use those statements from the minor *as the sole basis* for any jurisdiction finding." (Italics added.)

[4] In her notice, Mother states she is appealing from "the findings and orders made by the Court in a contested Jurisdiction and Disposition Hearings held on August 15, and August 30, 2005." A juvenile court's jurisdictional findings are not separately appealable, but they can be reviewed on appeal from the dispositional order, which is the only appealable order generated from an initial dependency proceeding. (*In re Athena P.* (2002) 103 Cal.App.4th 617, 624; *In re Tracy Z.* (1987) 195 Cal.App.3d 107, 112.) Therefore, in accordance with the rule that a notice of appeal is to be liberally construed in favor of its sufficiency (Cal. Rules of Court, rule 1(a)(2)), we construe Mother's notice of appeal as being from the appealable written dispositional order filed on September 19, 2005. (*In re Daniel Z.* (1992) 10 Cal.App.4th 1009, 1017.)

Three paragraphs in the detention report recount statements apparently made by Mother to the case worker. The court overruled Mother's hearsay objection, ruling that the statements constituted admissions.

Mother's hearsay objection to a comment by E.R. in the detention report about visiting Mother was sustained.

Mother's hearsay objections to comments by E.R. in the disposition report, and repeated in the first addendum, about being fearful of Mother and not wanting to go back to her, were sustained.

The general outlines for conducting a jurisdictional hearing in a dependency proceeding are spelled out in section 355. The pertinent language is as follows:

"(a) At the jurisdictional hearing, the court shall first consider only the question whether the minor is a person described by Section 300. Any legally admissible evidence that is relevant to the circumstances or acts that are alleged to bring the minor within the jurisdiction of the juvenile court is admissible and may be received in evidence. Proof by a preponderance of evidence must be adduced to support a finding that the minor is a person described by Section 300. . . .

"(b) A social study prepared by the petitioning agency, and hearsay contained in it, is admissible and constitutes competent evidence upon which a finding of jurisdiction pursuant to Section 300 may be based, to the extent allowed by subdivision[] (c) . . . .

"(1) For the purposes of this section, 'social study' means any written report furnished to the juvenile court . . . in any matter involving the custody, status, or welfare of a minor in a dependency proceeding . . . .

"(2) The preparer of the social study shall be made available for cross-examination upon a timely request by any party . . . . [¶] . . . [¶]

"(c)(1) If any party to the jurisdictional hearing raises a timely objection to the admission of specific hearsay evidence contained in a social study, the specific hearsay evidence shall not be sufficient by itself to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based, unless the petitioner establishes one or more of the following exceptions:

"(A) The hearsay evidence would be admissible in any civil or criminal proceeding under any statutory or decisional exception to the prohibitions against hearsay.

"(B) The hearsay declarant is a minor under 12 years who is the subject of the jurisdictional hearing . . . .[5]

"(C) The hearsay declarant is a peace officer . . . a social worker . . . .

"(D) The hearsay declarant is available for cross-examination . . . ."

A knowledge of this statutory framework illumined the juvenile court's prehearing rulings on Mother's objections. For example, the court's first ruling almost mirrors the language of subdivision (c)(1). In addition, the evidentiary provisions of section 355 are limited to hearsay in a "social study," and the court's rulings were scrupulous in not going beyond Mother's specific hearsay objections to parts of the social studies prepared by the Department. Again using the court's first ruling as the example, it did not prevent the court from considering the information in the contested portions of the detention report with other evidence, only that those portions would not be used as the exclusive basis for a jurisdictional finding.

Mother argues that the juvenile court should have sustained her objection to the "Screener Narrative" attached to the detention report because it, too, constituted hearsay. This argument is circular. The "Screener Narrative" simply provides the text that is reproduced in the detention report, text to which the court sustained Mother's hearsay objection, subject to the proviso mentioned above. And it should be noted that the court followed through on its ruling. The statements in the "Screener Narrative" and the detention report were the only support for a part of the allegation which the court did *not* sustain—that Mother struck E.R. with her hairbrush "on his shoulders, back and the bottom of his neck, and banged his head on a bunk bed."

Mother also argues the juvenile court erred in overruling her hearsay objection to Officer Nevin's testimony about the statements made by E.R. when Nevin spoke with him at the fire station. We see no error. What the distraught E.R. told Nevin would

[5] E.R. was older than 12 at the time of the April 21 incident with Mother.

qualify as spontaneous statements, and were therefore admissible over a hearsay objection. (Evid. Code, § 1240; see *In re Damon H.* (1985) 165 Cal.App.3d 471, 474-477 [accusation of molestation made about 40 minutes after event]; *People v. Orduno* (1978) 80 Cal.App.3d 738, 741-742, 745-746 [accusation of molestation made within 10 minutes]; cf. Evid. Code, § 1370 [narrative of infliction of injury from unavailable witness to law enforcement official made "at or near the time of the infliction" of the injury is admissible].) Moreover, Nevin was testifying with the aid of the police incident report he prepared, and Mother did not object when that report was received in evidence. In light of that overlap, any error would be harmless. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

We now turn to Mother's specific arguments.

Substantial Evidence Supports the Jurisdictional Findings

"At a jurisdictional hearing, the juvenile court ' "shall first consider . . . whether the minor is a person described by Section 300 and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him or her within the jurisdiction of the juvenile court is admissible and may be received in evidence." ' [Citation.] [¶] 'While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances at the time of the hearing subject the minor to a defined risk of harm.' [Citation.] Thus previous acts of neglect, standing alone, do not establish a substantial risk of harm; there must be some reason beyond mere speculation to believe they will reoccur. [Citations.]" (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 564-565.)

Citing decisions such as *In re Ricardo L.*, *supra*, 109 Cal.App.4th 552, *In re Jasmine G.* (2000) 82 Cal.App.4th 282, and our decision in *In re Rocco M.* (1991) 1 Cal.App.4th 814, Mother tries to present the incident as nothing more than an unfortunate, but understandable, loss of parental control when responding to a teenager's normal instinct to test the limits of parental tolerance. As Mother argues, her striking E.R. with her hairbrush was a one-time flare of temper, nothing more, which produced

nothing like serious physical harm to her son. This is perhaps one way of viewing the evidence, but it is not the only way. More importantly, it is not the way adopted by the juvenile court. Mother's attempt to downplay the injuries suffered by E.R. is to no avail.[6]

The extent of the blow with her hairbrush is best depicted by the photograph produced during Officer Nevin's testimony, and received in evidence. The juvenile court saw that photograph; we have not. According to the established rules governing substantial evidence review, we cannot reweigh the impact of the photograph, but must, and do, assume that it fully supports the court's implied finding that E.R. suffered serious injury. Then there is the matter of E.R.'s telling Officer Nevin that Mother had also attacked him with an extension cord. The fact that Mother put down the hairbrush and picked up another weapon shows an impulse not easily dismissed as a momentary flash of fear or bad temper. Moreover, the juvenile court could also be impressed by the fact that E.R. fled from his home, sought refuge at a fire station , and was sobbing when he reported the incident to Officer Nevin.[7] Further proof that the incident was not treated as routine may be found in the fact that it was thought appropriate to have E.R.'s injuries examined at a hospital.

This court has long accepted that "the past infliction of physical harm . . . does not establish a substantial risk of physical harm; '[t]here must be some reason to believe the acts may continue in the future.' [Citations.]" (*In re Rocco M., supra*, 1 Cal.App.4th 814, 824; see § 300, subd. (a) ["a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child . . . or a combination of these and other actions by the parent . . . which indicate the child is at risk of serious physical harm"].) Here, however, the juvenile court had a basis for concluding that the danger was not a thing of the past.

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[6] Mother appears to have abandoned her position at the hearing that any injuries E.R. suffered were in effect self-inflicted when he jumped out the apartment window.

[7] Granted, this could have been a manifestation of E.R.'s noted tendency toward manipulation, but the juvenile court almost certainly took that tendency into account.

Mother admitted that she had in the past disciplined E.R. with a belt. She also admitted that she was angry when she hit E.R. with the hairbrush. According to Luong, Mother also admitted to having hit E.R. in the past with her hands. E.R. told Luong that Mother "gets angry very easily," which would explain E.R.'s apprehension about returning to Mother's home. In his first addendum to the disposition report, Luong advised the court that the father had learned how to "handle" E.R. with the help of family therapy. At the hearing, Luong testified that Mother refused to attend family therapy unless ordered to do so by the court. From these sources the court could conclude: (1) that Mother struck E.R. out of anger, not fear; (2) that Mother had used violence in the past; (3) that Mother declined to acquire the information that would equip her to curb her temper and deal with E.R.; (4) that unless and until she did, she and E.R. would continue to have "a conflicted relationship"; and (5) that there was therefore a continuing risk of a recurrence of the incident. Presented with such a risk, the juvenile court was empowered to act. (See *In re Rocco M.*, *supra*, 1 Cal.App.4th 814, 824; *In re Eric B.* (1987) 189 Cal.App.3d 996, 1002-1003.)

Because Luong was available for cross-examination at the combined jurisdictional-dispositional hearing, his written opinions were admissible (§ 355, subds. (a), (c)(1)(C) & (D)), and his testimony itself constitutes substantial evidence in support of the jurisdictional finding. (Evid. Code, § 411.) Mother has failed to establish that the totality of the evidence cannot furnish the requisite support for the finding. (*In re L. Y. L.*, *supra*, 101 Cal.App.4th 942, 947.)

Substantial Evidence Supports the Custody Order

"At a dispositional hearing, the court's findings must be made on clear and convincing evidence. The court must find that the welfare of the child requires that she be removed from parental custody because of a substantial danger, or risk of danger, to her physical health if she is returned home and that there are no reasonable means to protect her without removing her. [Citations.] On review, we employ the substantial evidence test, however, bearing in mind the heightened burden of proof." (*In re*

Kristin H. (1996) 46 Cal.App.4th 1635, 1654.) But "bearing in mind" does not alter the fundamental fact that our sole task is to determine whether the juvenile court's decision is supported by substantial evidence. The "clear and convincing" standard is for the juvenile court, not the reviewing court. (*In re Henry V.* (2004) 119 Cal.App.4th 522, 529; *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 365, p. 415.) The record has more than ample basis to satisfy the substantial evidence standard.

The juvenile court had before it the Department's recommendation in the second addendum to the disposition report, and in the testimony of Luong, the case worker who prepared the addendum. As Luong explained on the stand, the custody recommendation reflected the desires of E.R., his father, his Mother (if only temporarily), and the best opinion of the Department.[8] As explained above, the juvenile court could conclude that E.R.'s injury was the result of Mother's inability to control her exasperation with her son, and that that state of affairs was unlikely to change as long as Mother continued to resist getting therapy. There was consequently a continuing risk of another incident if E.R. was returned to Mother's custody.

It is true that Mother changed her position at the hearing, and wanted to reunite with E.R. But that, at best, presented merely a determination of credibility, a matter entrusted exclusively to the juvenile court. (*In re L. Y. L., supra,* 101 Cal.App.4th 942, 947; *James B. v, Superior Court* (1995) 35 Cal.App.4th 1014, 1021.) Moreover, it must count for something that E.R.'s counsel did not oppose the Department's recommendation.

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[8] Mother's heavy reliance on *In re Jasmine G., supra,* 82 Cal.App.4th 282, is misplaced. In *Jasmine G.*, the minor had no fear of her parents, did not believe parental violence would reoccur, and wanted to be reunited. For their part, both of the minor's parents (who lived apart) wanted to reunite with her. Moreover, the parents' therapist urged returning the minor to parental custody. Only the social worker was opposed. (*Id.* at p. 286.)Finally, the court in *Jasmine G.* refused to return custody to the mother, but did not even consider placing the minor with her father. (*Id.* at pp. 288, 292.) The evidence here is sufficiently dissimilar to make *Jasmine G.* factually distinguishable.

In light of the foregoing, we conclude that substantial evidence supports the juvenile court's finding, made on the basis of clear of convincing evidence, that returning E.R.'s custody to Mother presented a risk of danger and was not in his best interests.

The dispositional order is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Haerle, J.